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Supreme Court, U.S.
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No. 10-318

IN THE

Supreme Court of the United States

KEVIN H. McKENNA,

Petitioner,

v.

NESTLÉ PURINA PETCARE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioner Kevin H. McKenna (hereinafter "Petitioner") requests this Honorable Court to enact new law requiring litigants enter into a stipulation of facts prior to a defendant being afforded the opportunity to move for summary judgment in an employment discrimination case brought by pro se plaintiff. Based on the arguments contained within the Petition, Respondent Nestlé Purina PetCare Company (hereinafter "Respondent") believes the actual question presented is whether the Appellate Court erred in affirming the District Court's grant of summary judgment in favor of Respondent.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Nestlé Purina PetCare Company does not have a parent corporation and there is no publicly held company that owns 10% or more of its stock.

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STATEMENT OF THE CASE

Petitioner's Statement of the Case spans fourteen (14) pages, most of which is either irrelevant or inaccurate. Petitioner omits numerous facts relevant to the Petition.

Petitioner and Ms. Nancy Goss (hereinafter "Goss"), a co-worker, were involved in sexual relationship that Petitioner refers to as "consensual" and "very casual, 'adulterated' type workplace friendship." Pet. App. Br., p. 4. This relationship ended in July 2004.

Petitioner approached the Human Resource Manager at Respondent's Zanesville, Ohio Plant, Carol Kagenski (hereinafter "Kagenski"), on August 31, 2004 regarding Goss. *Id.* at p. 5. Petitioner informed Kagenski that he felt Goss was exhibiting jealously when Petitioner interacted with other female employees. Pet. App., p. 3a; D.C. R[1]. 127 at Exhibit A. Petitioner specifically requested that Kagenski take no action based on their conversation. Petitioner followed-up this verbal request that Kagenski take no action with a written request that Kagenski take no action. Pet. App., p. 20a. Petitioner stated, "It is not, and was not my intent to file a complaint or take any sort of 'Action' in regards to the matter." *Id.* Petitioner reiterated, "It is with this document that I am making it formally known that it is my (emphatic) wish that there be absolutely NO ACTION taken by the company in any way shape or

1. Petitioner omits several relevant documents from his appendix. As such, D.C. R. is a reference to the record in the District Court.

form regarding this matter at this time." *Id.* [emphasis in original].

Goss witnessed Petitioner approach Kagenski and assumed Petitioner did so to discuss her. Goss approached supervisor Mary "Mitzi" Link (hereinafter "Link") and requested Link arrange a meeting between her and Kagenski. Pet. App., p. 3a. Goss then informed Kagenski that she and Petitioner were involved in an eleven (11) month affair that recently terminated. Petitioner had not informed Kagenski of this relationship. D.C. R. 127 at Exhibit A. Kagenski concluded that Petitioner and Goss were merely experiencing the usual post-breakup pains and decided the best of course of action was to monitor the situation. Pet. App., p. 3a.

Since the termination of her relationship with Petitioner, Goss believed that Petitioner and Ms. Lisa Ellis (hereinafter "Ellis"), another employee of Respondent, began a sexual relationship. Pet. App. Br., p. 5. Goss's belief was not without foundation given that Respondent, Goss, and Ellis previously engaged in sexual acts together. Pet. App., p. 2a. On or about September 24, 2004, Goss sent Ellis a letter that was hostile and threatening. *Id.* at pp. 3a-4a. Ellis presented this letter to Link, who in turn provided a copy to Kagenski. *Id.* at 4a; Pet. App. Br., p. 6.

Respondent determined the letter Goss sent Ellis was threatening and hostile and suspended Goss's employment on October 1, 2004. Pet. App., p. 4a. It was during this time, that Respondent's Corporate Human Resource Manager, Garry DeWit (hereinafter "DeWit"),

decided to monitor and review the email accounts of Goss, Ellis, and Petitioner. Pet. App., p. 4a; D.C. R. 127 at Exhibit A and Exhibit C. During a review of the email accounts, Respondent discovered sexually explicit emails and pornographic pictures that Petitioner sent and received with his company email account and his company computer. Pet. App., p. 4a. After discovering these emails, Petitioner was suspended on October 8, 2004. D.C. R. 127 at Exhibit A. Petitioner's actions were in direct contravention of Respondent's Electronic Communication Policy (hereinafter "ECP").

Among the pictures that Petitioner sent and received, four (4) depicted a male stripper in various sexual poses with a female. Pet. App., p. 4a. Petitioner does not dispute these pictures were discovered on his computer and admits they were pictures of a stripper. Petitioner states, "The pictures referenced are pictures of a friend, 4 of which are at a Bachelorette party with a *professional* male 'stripper...'" D.C. R. 3-2, p. 7 [emphasis in original].

Another email was Petitioner's account of masturbating at his desk. Pet. App., p. 26a. In this email, Petitioner states, "...found out something interesting...was sitting here a bit ago...*HAPPENED* to have my hand across my lap...started tapping my fingers...jeans were tight enough I could FEEL the tapping across my c#ck...felt GOOD..." *Id.* [all emphasis and punctuation in original].

Yet another email described a sexual interaction with another female, Tammy Sparks, in which Petitioner stated, "you'll be able to feel yourself contracting all

over your hand, how wet, excited you are/get, how your cunt gushes from being HF'd..MMm." Pet. App., p. 26a. Not only was this email sent from Petitioner's company computer, but it was also sent from Petitioner's company email account. Petitioner did not dispute this email was discovered on his computer. Petitioner describes his email to Tammy Sparks as: "Mr. McKenna and Ms. Sparks were simply scheduling a date as expressly permitted by the policy." Petitioner further states, "The remark was within the context of Ms. Sparks and Mr. McKenna's friendship, and was non-offensive to any of the parties involved. The Electronic Communications Policy does not explicitly prohibit an and all sexual content." D.C. R. 3-2, p. 8.

Petitioner's argument to this Court that sexually explicit emails and pornographic pictures were not discovered in his email account or on his company computer is based on the fact that Petitioner does not consider these emails sexually explicit or pornographic. Petitioner was employed as an Information System Technician. Pet. App., p. 1a. As such, Petitioner and one other employee at Respondent's Zanesville Plant oversaw Respondent's computer system. The proverbial fox was in the hen house.

After discovering these sexually explicit emails and pornographic pictures, Respondent suspended Petitioner's employment. Respondent then completed its investigation of the letter Goss sent Ellis and terminated Goss's employment. On October 14, 2004, Respondent also terminated Petitioner's employment for violating the ECP. Respondent's review of Goss, Ellis, and Petitioner's emails also uncovered violations of the

ECP by Ellis. Pet. App., p. 4a. Ellis was placed on an action plan and suspended three (3) days as Respondent determined her violations of the ECP involved excessive personal use of the email system. Ellis did not, however, send and receive sexually explicit emails or pornographic pictures. *Id.*

Petitioner asserts he was not made aware of the basis for his termination; yet, on October 18, 2004, Petitioner sent an email to Respondent requesting he be permitted to return to his position. In this email, Petitioner admits to violating Respondent's ECP and states, "...I KNOW that I have violated the Electronic Communications Policy, I'd never in my wildest dreams even think of challenging that fact..." Pet. App., p. 11a [emphasis in original]. This was not an offhand comment by Petitioner as he again asserted, "The point of the previous paragraph is that I very full and well know I was/am in violation of the company's Electronic Communications Policy. I am/was also fully aware of the potential consequences (IE- up to, and including possible termination). *Id.* Despite this prior admission, Petitioner attempted to convince the District Court, the Appellate Court, and now this Honorable Court that he did not violate Respondent's ECP. Petitioner's arguments are without merit.

REASONS FOR DENYING THE PETITION

I. Petitioner Presents No Compelling Reason For Granting The Petition.

Petitioner advances no legitimate or significant reason for granting his petition. Petitioner misinterprets

the after acquired evidence doctrine, disregard's the District Court's reliance on undisputed and uncontroverted evidence, and attempts to allege fraud on the court by Respondent's reference to his relationship with Goss as romantic. There is no legitimate basis for granting Petitioner's Petition. This is a case where Petitioner does not agree with the outcome, nothing more. Petitioner cites no conflict among the Circuit Courts based on the Sixth Circuit's ruling and cites no issue of great importance other than Petitioner's own self-interest in continuing his crusade against Respondent.

This is now the second Petition that Petitioner has filed with this Honorable Court. *See* Case No. 10-121, cert. denied. Both Petitions are devoid of any cohesive argument in favor of granting Petitioner's request and both petitions are laced with personal attacks on Nestlé's Counsel without any legal or factual support.

The question Petitioner presents was not brought before the District Court or Appellate Court. As such, this Court should decline to address it. *See Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 109, 122 S. Ct. 511, 151 L.Ed.2d 489 (2001).

II. Petitioner Does Not Establish Respondent Committed Fraud On The Court.

Petitioner argues that Respondent committed fraud on the court by referring to his relationship with Goss as a romantic relationship. Petitioner previously referred to his relationship with Goss as a "consensual" and "adulterated friendship." Petitioner does not

dispute that he and Goss shared a sexual relationship. Petitioner admitted that his relationship with Goss involved sensual/erotic conversations via email that spawned sexual events between Petitioner and Goss. Pet. App., p. 27a. Petitioner does not dispute that he, Goss, and Ellis engaged in sexual acts, and Petitioner does not dispute that his email to Tammy Sparks was an attempt to schedule a date. Yet, somehow Respondent's reference to Petitioner's relationship with Goss as romantic is fraudulent and "*defaming* McKenna, McKenna's wife and McKenna's marriage..." Pet., p. 19. Apparently engaging in an eleven month affair, engaging in sexual acts with two other women and scheduling a date with another woman is within the bounds of Petitioner's marriage, but referring to Petitioner's affair as romantic is defamatory. Petitioner's arguments are beyond the realm of reasonableness and lack any basis.

Petitioner's arguments are also irrelevant. It does not matter whether Petitioner and Goss simply engaged in sexual acts, engaged in an affair, or engaged in a romantic relationship. What matters is it is undisputed this relationship was consensual. Even if the relationship was not romantic, it was still consensual and the consensual nature of the relationship is what formed the basis for the District Court granting Respondent's motion for summary judgment. Further, Petitioner testified that after his relationship with Goss terminated, Goss did not make any sexual advances, did not make any threats, and did not make any demands. Pet. App., pp. 3a, 18a-19a. Petitioner's arguments regarding the nature of the relationship do not affect the outcome of this case. Referring to Petitioner's

relationship as romantic does not rise to the level of committing fraud on the court. As Petitioner notes, "This, 'fraud on the court' is typically confined to the most egregious cases..." *Broyhill Furniture Indus., Inc. v. Craftmaster Furniture Corp.*, 12 F.3d 1080, 1085-86 (Fed. Cir. 1993). Referring to Petitioner's relationship with Goss as romantic is not egregious but semantic. If referring to this relationship as romantic was improper it certainly does not rise to the level of committing fraud on the court.

Petitioner asserts that Respondent committed fraud on the court by referring to Link as another supervisor. Pet., p. 27. Respondent has never disputed that Link was the supervisor to both Petitioner and Ellis. It appears Petitioner is attempting to argue the District Court and Appellate Court erred in not referring to Link as the supervisor for both Ellis and Petitioner. Again, any such argument is irrelevant. The facts demonstrated that both Petitioner and Ellis were disciplined for violating Respondent's ECP. Petitioner was terminated based on sending and receiving sexually explicit emails and pornographic pictures. Petitioner was one of two (2) employees in charge of computer system for Respondent's Zanesville Plant. Ellis, an accounting clerk, violated the ECP by using her company computer and email for excessive personal use. Pet., p. 4a. Petitioner and Ellis did not engage in the same conduct. Any inference that they were similarly situated and treated differently is simply not based on fact. Both the District Court and Appellate Court analyzed whether Petitioner and Ellis were similarly situated and both determined they were not based on their different job duties and, most significantly, that Petitioner and Ellis

did not engage in the same conduct. Pet. App., pp. 24a, 33a. Accordingly, the District Court and Appellate Court properly determined that Petitioner and Ellis were not similarly situated.

III. Petitioner Never Asserted A Claim For Supervisory Harassment.

Petitioner never asserted a claim for harassment or hostile work environment based on Link's conduct. Petitioner misleads this Court in asserting that any claims based on Link's conduct were before the District Court as Petitioner never filed the proposed amended complaint containing these claims. Petitioner's "Amendment [sic] to Complaint" specifically stated, "Within the initiating Motion to amend [sic], the Plaintiff had represented that he wished to raise additional matters. Since the filing of the Motion to Amend, due to a number factors..., the Plaintiff chooses not to raise additional matters in the Statement of Claim at this time." D.C. R. 83. Petitioner attempts to mislead this Court by citing to his motion to amend the complaint and the "Supplemental Statement of Claim" appended thereto. Petitioner fails to inform this Court that once he was granted leave to amend, he did not file this "Supplemental Statement of Claim." Instead, Petitioner filed an amended complaint that only asserted state law claims. No claim for harassment or hostile work environment was before the District Court; however, the District Court still noted that Petitioner could not succeed on any such claim even it had been advanced. Pet. App., p. 27a.

IV. The District Court And Appellate Court Considered The Totality Of The Circumstances.

Petitioner advances no substantive argument that the District Court or Appellate Court failed to properly consider the totality of the circumstances. This omission is likely intentional because Petitioner cannot advance any such argument. The District Court considered the totality of the circumstances and relied on Petitioner's own deposition testimony in dismissing Petitioner's claims for sexual harassment and hostile work environment. Petitioner testified that after the consensual relationship with Goss terminated, Goss did not make any sexual advances, threats, demands, or sexual remarks. Pet. App., pp. 3a, 18a-19a.

V. Respondent Did Not Rely On After Acquired Evidence.

Petitioner's argument that Respondent relied on after acquired evidence is misplaced. Petitioner simply does not understand the after acquired evidence doctrine. The after acquired evidence doctrine applies when the legitimate, nondiscriminatory reason for the adverse employment action was "non-existent at the time of the adverse decision..." *Delli Santi v. CNA Ins. Companies*, 88 F.3d 192, 205 (3rd Cir. 1996). As this Honorable Court noted, after acquired evidence does not operate to bar all relief. *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 358, 115 S.Ct. 879, 130 L.Ed.2d 852 (1995). The after acquired evidence doctrine presumes the adverse employment action suffered by the employee was a result of discrimination. More importantly, the bedrock of the after acquired

evidence doctrine is that the employer is permitted to introduce evidence of an employee's wrongdoing even though the employer was unaware of the wrongdoing when it made the adverse decision. That is not the case here. Here, Respondent possessed evidence of Petitioner's wrongdoing when it made the decision to terminate Petitioner.

Respondent uncovered sexually explicit emails and pornographic pictures prior to Petitioner's termination. Pet. App., p. 4a; D.C. R. 127 at Exhibit A and C. Both Kagenski and DeWit attested to this fact and Petitioner previously admitted these emails were uncovered on his company computer. Petitioner, instead, argued these emails were not sexually explicit or pornographic. Respondent then terminated Petitioner based on these emails. The District Court properly determined that reasonable minds could only conclude that the emails Petitioner sent and received were sexually explicit. Pet. App., p. 13a-14a.

Petitioner argues that Goss's deposition testimony was inadmissible and could not support Respondent's motion for summary judgment. Petitioner asserts, "It is simply, factually 'impossible' that statements made by Goss in 2006 could have affected Nestlé's motives/decisions in 2004!!" Pet., p. 33 [emphasis removed]. Petitioner argues that Respondent cannot rely on Goss's deposition testimony because her deposition occurred after his termination. *Id.* Following Petitioner's reasoning, a defendant could never use deposition testimony or trial testimony to defend a claim or lawsuit because such testimony is obtained after the adverse employment action.

Petitioner seriously confuses the after acquired evidence doctrine. Statements made by Goss during her depositions were not used to terminate Petitioner or justify his termination. Goss's statements were used to refute Petitioner's claims that he suffered retaliation or harassment. Goss's deposition testimony was used to defend Petitioner's claims, not to justify the legitimate, nondiscriminatory reason for Petitioner's termination.

Petitioner also confuses the statement made by Respondent in the October 19, 2004, letter sent to Petitioner. This letter stated, "Furthermore, your termination has no relationship to any previous conversations you may have had with our local HR Manager." Pet. App., p. 42a. It is clear that this letter states Petitioner's termination was not related to any conversation he had with Kagenski. Petitioner's termination was based on violating the ECP and not because he informed Kagenski of Goss's jealously on August 31, 2004. Petitioner somehow misinterprets the clear language of this letter and attempts to argue that Respondent cannot now rely on statements made by Goss based on representations made in this letter.

Contrary to Petitioner's arguments, the sexually explicit emails and pornographic pictures do exist on the record. It is not without design that Petitioner specifically argues that pornographic pictures were not discovered in his company email account. Pet., p. 38. Petitioner does not argue the sexually explicit emails were not discovered in Petitioner's Outlook and Petitioner does not argue the pornographic pictures were not sent from his company computer and through

Respondent's computer network. Petitioner attempts to mislead this Court with his arguments because the sexually explicit emails were discovered in Petitioner's Outlook while the pornographic pictures were sent from Petitioner's Outlook account and saved on Petitioner's computer, as evidenced by the following reference on the pictures: file://C:\Zanesville%20-%20McKenna\5jpg. D.C. R. 127 at Exhibit A.

Contrary to Petitioner's arguments, the emails were attached to the affidavits of both Kagenski and DeWit, who both attested to their authenticity and both attested they were discovered on Petitioner's computer. Petitioner argues that he would not still be pursuing this case if pornographic pictures were actually discovered on his computer. Petitioner does so because he does not believe the emails are sexually explicit and does not believe the pictures are pornographic. Pet., p. 37. Petitioner previously admitted he sent and received these emails and pictures. D.C. R. 3-2. Petitioner sees nothing wrong with pictures of a male stripper in various sexual positions with a female and does not view the word "cunt" as vulgar. Pet. App., p. 13a-14a. In short, Petitioner is not disputing he sent and received these pictures, but is disputing they were sexually explicit and/or pornographic. This contention is obviously without merit. There is no clear-cut definition of sexually explicit or pornographic, "But, I know it when I see it...," as Justice Potter Stewart concluded. *Jacobellis v. State of Ohio*, 378 U.S. 184, 197 (1964) (Stewart, P., concurring). Respondent knows it too, and terminated Petitioner's employment based on these sexually explicit emails and pornographic pictures.

VI. Petitioner's Claims Were Heard.

In the ultimate paradox, Petitioner asserts he will not stipulate to anything but the names of the parties in this case and then argues that "summary judgment is untenable in the absence of *stipulation* of facts..." Pet. p. 42-43 [emphasis in original]. Civil Rule 56 and years of case law disagree with Petitioner. Petitioner then argues this Court should enact law, "By this Court simply enacting law that in *all employment discrimination cases*, that a plaintiff, particularly in the case of a *pro se* plaintiff, would be *lawfully* entitled to *full opportunity* to enter into a *stipulation of facts and claims* ***before*** summary judgment..." Pet. p. 45 [emphasis in original]. Petitioner essentially requests this Court rewrite Federal Rule of Civil Procedure 56 and Title VII. While this Court is vested with great powers, enacting law is not one of those powers. The civil rules of litigation generally apply to Title VII cases. *See United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 716, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983).

Petitioner's request is not practical even if this Court had authority to enact law. If such a stipulation was required before a defendant could move for summary judgment then plaintiffs who refuse to stipulate to any facts, such as Petitioner, could effectively hold a defendant and the course of litigation hostage by such refusal. A defendant would then not be permitted to move for summary judgment, which would effectively insure all employment discrimination cases proceeded to trial. The defense bar may approve as attorney fees for each employment discrimination case would sky

rocket, but this is simply not feasible and not what the law requires. Petitioner's suggestion is also not applicable to the facts of this case. As stated, Petitioner admitted the emails were discovered on his computer and admitted he violated the ECP before he even filed his complaint. In essence, Petitioner entered into a stipulation before he even filed a lawsuit.

Petitioner's citation to the Honorable Judge Dlott's standing order is intended to mislead this Court. This case was not before Judge Dlott and Judge Dlott's standing order was not applicable to these proceedings. Further, Judge Dlott's standing order does not require a stipulation of facts prior to a party moving for summary judgment. Judge Dlott's standing order requires all material facts find support in deposition testimony, affidavits, or other evidence. Pet. App., p. 37a. Respondent's motion for summary was supported by deposition testimony, affidavits, and other evidence. Petitioner did not and could dispute this evidence. As such, the District Court granted Respondent's motion for summary and the Appellate Court determined this decision was proper.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Honorable Court deny the Petition.

Respectfully submitted,

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